No. 05-439
Vide 04-10649, 05-204, 05-254, 05-276, 05-298, 05-460

(25)

Title: GI Forum of Texas, et al., Appellants
v.
Rick Perry, Governor of Texas, et al.

Docketed: October 5, 2005
Lower Ct: United States District Court for the Eastern District of Texas
Case Nos.: (2:03-CV-354)
Decision Date: June 9, 2005
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 3 2005	Statement as to jurisdiction filed. (Response due November 4, 2005)
Oct 11 2005	Waiver of right of appellees Rick Perry, Governor of Texas, et al. to respond filed.
Oct 13 2005	DISTRIBUTED for Conference of October 28, 2005.
Oct 31 2005	DISTRIBUTED for Conference of November 4, 2005.
Nov 7 2005	DISTRIBUTED for Conference of November 10, 2005.
Nov 18 2005	DISTRIBUTED for Conference of November 23, 2005.
Nov 28 2005	DISTRIBUTED for Conference of December 2, 2005.
Dec 5 2005	DISTRIBUTED for Conference of December 9, 2005.
Dec 12 2005	PROBABLE JURISDICTION NOTED The case is consolidated with Nos. 05-204, 05-254, 05-276, and a total of two hours is allotted for oral argument.
Dec 15 2005	The opening briefs of appellants are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, January 10, 2006. The brief of appellees is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, February 1, 2006. Reply briefs of appellants, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, February 22, 2006. The cases are set for oral argument at 1 p.m., Wednesday, March 1, 2006.
Dec 15 2005	SET FOR ARGUMENT on Wednesday, March 1, 2006.
Jan 5 2006	Brief amici curiae of University Professors Concerned about Equal Representation for Equal Numbers of People filed. VIDED. (Distributed)
Jan 9 2006	Brief of appellee Charles Soechting in support filed. (Distributed)
Jan 9 2006	Brief amici curiae of The Reform Institute, Thomas Mann, and Norman Ornstein filed. VIDED. (Distributed)
Jan 10 2006	CIRCULATED.
Jan 10 2006	Brief of appellants GI Forum of Texas, et al. filed. (Distributed)
Jan 10 2006	Brief amicus curiae of Brennan Center for Justice at NYU School of Law filed. VIDED. (Distributed)
Jan 10 2006	Brief amicus curiae of Center for American Progress filed. VIDED. (Distributed)
Jan 10 2006	Brief amicus curiae of Professors Gary King, et al. in support of neither party filed. VIDED. (Distributed)
Jan 10 2006	Brief amici curiae of Samuel Issacharoff, Burt Neuborne and Richard H. Pildes filed. VIDED. (Distributed)

Jan 10 2006	Brief amicus curiae of NAACP Legal Defense and Educational Fund, Inc. filed. VIDED. (Distributed)
Jan 17 2006	Motion for divided argument filed by appellants in Nos. 05-254, 05-276, and 05-439. VIDED. (Distributed)
Jan 17 2006	Motion for divided argument filed by appellants No. 05-204. VIDED. (Distributed)
Jan 20 2006	Application (05A663) to file respondents brief on the merits in excess of page limits, submitted to Justice Scalia.
Jan 23 2006	Supplemental letter of applicant received.
Jan 23 2006	Motion for divided argument filed by petitioners GRANTED. The time is to be divided as follows: 40 minutes for appellants in No. 05-276 and 20 minutes for appellants in No. 05-439.
Jan 23 2006	Motion for divided argument filed by appellants in No. 05-254 DENIED.
Jan 24 2006	Application (05A663) to file a consolidated appellees brief in excess of page limits granted by Justice Kennedy. The brief may not exceed 125 pages.
Jan 31 2006	Brief amicus curiae of Ron Wilson filed. VIDED. (Distributed)
Feb 1 2006	Brief of appellees Tina Benkiser and John DeNoyelles filed. VIDED. (Distributed)
Feb 1 2006	Brief of appellees Rick Perry, Governor of Texas, et al. filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of Glenn Richardson, et al. filed. VIDED. (Distributed)
Feb 1 2006	Brief amicus curiae of Henry Bonilla filed. (Distributed)
Feb 1 2006	Brief amici curiae of American Legislative Exchange Council and Free Enterprise Coalition filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of Alan Heslop, et al. filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of Republican National Committee filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of Robert C. Jubelirer filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of Utah, Nevada, and Ohio filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of United States filed. VIDED. (Distributed)
Feb 7 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Feb 17 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 22 2006	Reply of appellants GI Forum of Texas, et al., Appellants filed. (Distributed).
Mar 1 2006	Argued. For appellants in No. 05-276: Paul M. Smith, Washington, D.C. For appellants in No. 05-439: Nina Perales, San Antonio, Tex. For appellees: R. Ted Cruz, Solicitor General, Austin, Tex.; and Gregory G. Garre, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
FILED

No. 05-439 OCT 3 - 2005

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In The

Supreme Court of the United States

GI FORUM OF TEXAS, ET AL.,

Appellants,

v.

RICK PERRY, ET AL.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether political partisanship is sufficient justification, under section 2 and the Constitution, for dismantling a Latino-majority congressional district in order to elect the Anglo-preferred candidate.

2. Whether section 2 permits a state to eliminate a majority-minority district located in one area of the state and create another majority-minority district in a different area of the state.

3. Whether the District Court erred by requiring section 2 demonstrative districts to be more compact and to offer greater electoral opportunity to minority voters than the corresponding districts in the challenged redistricting plan.

4. Whether the number of majority-minority districts that can be created in the state functions as the upper limit of permissible political opportunity when assessing proportionality under *Johnson v. DeGrandy*.

LIST OF PARTIES

Plaintiffs and Plaintiff-Intervenors below:

American GI Forum of Texas; Simon Balderas; Gilberto Torres; Eli Romero; League of United Latin American Citizens District 7; Travis County, Texas; City of Austin, Texas; Gustavo Luis "Gus" Garcia; Eddie Jackson; Barbara Marshall; Gertrude "Traci" Fisher; Hargie Faye Jacob-Savoy; Ealy Boyd; J. B. Mayfield; Roy Stanley; Phyllis Cottle; Molly Woods; Brian Manley; Tommy Adkisson; Samuel T. Biscoe; David James Butts; Ronald Knowlton Davis; Dorothy Dean; Wilhelmina R. Delco; Samuel Garcia; Lester Gibson; Eunice June Mitchell Givens; Margaret J. Gomez; Mack Ray Hernandez; Art Murillo; Richard Raymond; Ernesto Silva; Louis Simms; Clint Smith; Connie Sonnen; Alfred Thomas Stanley; Maria Lucina Ramirez Torres; Elisa Vasquez; Fernando Villareal; Willia Wooten; Ana Yañez-Correa; Mike Zuniga, Jr.; Frenchie Henderson; League of United Latin American Citizens of Texas; Webb County; Cameron County; Juanita Valdez-Cox; Leo Montalvo; William R. Leo; Coalition of Black Democrats; Texas NAACP; Lester Bellow; Homer Guillory; John Bland; Rev. Willie Davis; and Congressmembers Sheila Jackson Lee, Eddie Bernice Johnson, Chris Bell, Gene Green, and Nicholas Lampson

Defendants below:

State of Texas; Rick Perry, Governor of Texas; Geoffrey S. Connor, Secretary of State of Texas; David Dewhurst, Lieutenant Governor of Texas; Tom Craddick, Speaker of the Texas House of Representatives; Charles Soechting, Chair of the Texas Democratic Party; Tina Benkiser, Chair of the Texas Republican Party

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OPINIONS AND ORDERS BELOW

The District Court's majority and concurring opinions following remand are reprinted in full in the Appendix to this Jurisdictional Statement ("J.S. App."). J.S. App. at 1. The District Court's final judgment is reprinted in full in the Appendix. J.S. App. at 59. The Order following trial of the case is reported at 298 F. Supp. 2d 451 (E.D. Tex. 2004) and is reprinted in full in the Appendix. J.S. App. at 61.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1253 to review the District Court's order. GI Forum, *et al.* Appellants ("GI Forum Appellants") filed their timely notice of appeal on August 2, 2005. *See* 28 U.S.C. § 2101(b). J.S. App. at 60.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Fifteenth Amendment to the United States Constitution provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, is reprinted at J.S. App. at 218.

STATEMENT OF THE CASE

Following the Texas Legislature's redistricting of congressional boundaries in 2003, the District Court in this case ruled twice that partisanship rendered acceptable the dismantling of a Latino-majority electoral district and the concentration of Latino voters into six instead of seven opportunity districts in the southern region of the

state. The decisions of the District Court raise critical issues that require this Court's guidance.

The intentional discrimination and vote dilution claims raised in this case are very likely to recur, particularly as more states struggle to resolve three redistricting doctrines affecting minority voting rights: the mandate to avoid minority vote dilution, the flexibility granted to states to alter district lines for partisan purposes granted in cases such as *Davis v. Bandemer*, 478 U.S. 109 (1986) and *Vieth v. Jubelirer*, 541 U.S. 267 (2004) and the limits on race-conscious redistricting set out in this Court's line of cases beginning with *Shaw v. Reno*, 509 U.S. 630 (1993).

More and more states attempting to balance their partisan goals with the voting power of a growing minority group will seek to determine whether they may, under the Equal Protection Clause and section 2, disperse these populations and dismantle their districts as the means to ensure the election of non minority-preferred candidates. This increasingly likely scenario exposes issues left unresolved by the Court's line of decisions defining unconstitutional racial gerrymandering, beginning with *Shaw*, and continuing through *Miller v. Johnson*, 515 U.S. 900 (1995).

GI Forum Appellants appeal the decision of the District Court following a remand by this Court to reconsider its ruling in light of *Vieth*. On remand, the District Court declined to reconsider the claims of Latino voters and organizations that the 2003 Texas congressional redistricting scheme discriminates against Latino voters, relying instead on its prior ruling that an asserted partisan motivation shields the State from liability even when the State intentionally limited Latino political opportunity. The District Court further declined to reconsider its prior ruling that the loss of a Latino-majority district was properly "offset" by the creation of another Latino-majority district elsewhere in the state even though the GI Forum Appellants demonstrated that the State could both preserve the existing district and create the new Latino district. These substantial questions require Court guidance.

I. Factual Background

Following the 2000 Census, the task of drawing a congressional district map in Texas fell to the federal court in *Balderas v. Texas*. After trial, the three-judge District Court issued its congressional plan on November 14, 2001, and that plan was used by Texas for its 2002 congressional elections. *Balderas v. Texas*, No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 14, 2001), *aff'd mem.*, 536 U.S. 919 (2002).

However, in 2003, Governor Perry called three separate special sessions to take up and alter the court-drawn map. In this process, as they had since the release of the 2000 Census data, Latino advocates sought an increase in congressional districts in the South Texas region.[1] The *Balderas* court had declined to create a seventh Latino-majority district in South Texas, stating that it was up to the Legislature to create such a district, and maintained the six-district configuration of the 1990's.

In 2003, the Texas Legislature, taking up what the *Balderas* court had left undone, decided to expand the South Texas congressional districts, adding geographic territory and Latino population. The new redistricting plan significantly expanded the area of South Texas congressional districts from 44 to 58 counties. The Legislature's redistricting plan in South Texas now encompassed enough population for seven congressional districts, with an overall Latino citizen voting age majority of 58 percent. J.S. App. at 124. Thus, the plan demonstrated that it is possible to create seven districts – each compact and wholly within the South Texas region – that would offer the opportunity to elect the Latino candidate of choice.

However, by concentrating that Latino population eastward into only six districts, the State minimized Latino political strength. The result was to squeeze seven

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[1] Because Latino population dominates the southern portion of the state, South and West Texas contain all of the State's Latino citizen voting age majority districts.

districts of Latino population into only six districts offering the opportunity to elect the Latino candidate of choice.

A. The State Dismantled District 23 as an Effective Opportunity District for Latinos

The Legislature radically reconfigured District 23 because it wanted to preserve the incumbency of Henry Bonilla, a Republican congressman whose declining support among Latino voters had placed his continued reelection in doubt.

The Legislature's changes to District 23 reduced the Spanish-surnamed registered voters from 55.3 percent to 44 percent, rendering the district incapable of electing the Latino-preferred candidate.

The Legislature chose to slice through Webb County and the City of Laredo, both of which have greater than 90% Latino population. Severing this tightly knit U.S.-Mexico border community in half, Texas mapmakers ignored traditional race-neutral considerations such as respect for political subdivisions and maintaining communities of interest. The result was 359,000 Latinos left stranded in a district in which they were "clearly not a majority of citizen voting age population and certainly not an effective voting majority." J.S. App. at 146.

The *Balderas* court had crafted District 23 in 2001 with 57.5 percent Hispanic citizen voting age population and 55.3 percent Spanish-surnamed registered voters. After placing this Latino-majority District 23 in its redistricting plan, the *Balderas* court referred to the six Latino-majority districts it created as "protected." *Balderas*, No. 6:01-CV-158, Slip Op. at 5, 9 and 12. As explained by Judge Ward, a member of the *Balderas* three-judge court:

> [Under] Plan 1151C, District 23 was a protected Latino opportunity district ... The *Balderas* court implicitly recognized that District 23 under Plan 1151C was a protected minority opportunity district when it maintained only six Latino majority citizen voting age districts. A review of the

> statistical package for Plan 1000C reveals that District 23 was one of those six districts.

J.S. App. at 190 (Ward, J., dissenting in part).

In the 2003 challenge to the Legislature's redistricting plan, the parties were in universal agreement that District 23, as created by the *Balderas* district court, was an effective opportunity district for Latino voters in 2002. Dr. Keith Gaddie, testifying for Defendants, found that District 23 in Plan 1151C "performed" for Latino voters in 2002, *i.e.*, elected the Latino candidate of choice in 13 of 15 statewide general elections; Dr. Gaddie further testified that a district that elects the Latino-preferred candidate in 13 out of 15 elections offers Latinos the opportunity to elect their candidate of choice.[2] Dr. Richard Engstrom, testifying for the GI Forum Appellants, and Dr. Alan Lichtman, testifying for Democratic Congressional incumbents, found similarly that District 23 in the court-drawn plan offered Latino voters the opportunity to elect their candidate of choice.[3]

Like many voters in Texas, Latinos in District 23 would "split" their tickets to support both Republican and Democratic candidates to statewide office. For example, in 2002, a majority of District 23 voters supported Republican candidates for Texas Comptroller and State Agriculture Commissioner and Democratic candidates for U.S. Senator and Governor. The District Court created District 23 in 2001 with election data showing that this collection of precincts gave a majority of its votes to Republican President George Bush and Republican Senator Kay

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[2] Jackson Pls. Ex. 140 (Gaddie deposition) at 128-29. Dr. Gaddie also noted that a different configuration of District 23 during the 1990's, which contained far lower levels of Latino voter registration and voting age population, had not been effective to elect the Latino-preferred candidate. *Id.* at 132. To the extent that the District Court relied on this testimony in its discussion of District 23 in the 2001 court-drawn plan, it was error.

[3] Jackson Pls. Ex. 1 (Lichtman expert report); GI Forum Pls. Ex. 86 (Engstrom expert report).